FILED

041366 APR 11 2005

OFFICE OF THE CLERK

No. 04-____

IN THE

Supreme Court of the United States

SANDY CALLERY,

Petitioner,

v.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B.'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC., and STAR BUFFET, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRIAN S. KING
Attorney at Law
336 South 300 East, Suite 200
Salt Lake City, UT 84111
(801) 532-1739

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Does ERISA §502(a)(3) permit an award of monetary damages to a plan participant from a fiduciary for a loss directly caused by a breach of fiduciary duty?

PARTIES TO THE PROCEEDING

All parties to the proceedings are identified in the caption of the case. Sandy Callery was a participant in an employee welfare benefit plan governed by The Employee Retirement Income Security Act of 1974 ("ERISA"). The Plan was, at various times, sponsored by JB's Restaurants, Inc., JB's Family Restaurants, Inc., and Star Buffet, Inc. The United States Life Insurance Company in the City of New York issued a life insurance policy that was the vehicle by which benefits were paid under the employee welfare benefit plan sponsored by the remaining defendants. Each of the respondents were alleged by the petitioner as being fiduciaries under ERISA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Petition is filed on behalf of an individual. The corporate disclosure statement is not applicable.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
FACTUAL BACKGROUND	2
PROCEEDINGS BELOW	3
REASONS FOR GRANTING THE WRIT	5
I. CIRCUIT AND DISTRICT COURTS ARE IN NEED OF DIRECTION REGARDING WHAT IS "APPROPRIATE EQUITABLE RELIEF" UNDER ERISA §502(a)(3)	7
II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH *GREAT-WEST* AND DENIES RELIEF TYPICALLY AVAILABLE IN EQUITY	10
TABLE OF CONTENTS FOR APPENDIX	A-i

TABLE OF AUTHORITIES

CASES — Page

Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard, 393 F.3d 1119 (10th Cir. 2004) 7

Aetna Health Inc. v. Davila, 542 U.S. 200, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004) 6, 9, 10

Bowerman v. Wal-Mart Stores Inc., 226 F.3d 574 (7th Cir. 2000) 9

Calhoon v. Trans World Airlines, Inc., 400 F.3d 593 (8th Cir. 2005) 9

Callery v. United States Life Insurance Co., 392 F.3d 401 (10th Cir. 2004) 2

Central States Pension Fund v. Central Transport Inc., 472 U.S. 559, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985) 11

Crosby v. Bowater, Inc., 382 F.3d 587 (6th Cir. 2004), *cert. pet. filed* 2/8/05 8

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)..... 11

Gerosa v. Savasta & Co., 329 F.3d 317 (2nd Cir. 2003) 8

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) ..... *passim*

Harris Trust & Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) 10, 11

Mathews v. Chevron Corp., 362 F.3d 1172 (9th Cir. 2004) 8

Mertens v. Hewitt Associates, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) 6

Parke v. First Reliance Standard Life Ins. Co., 368 F.3d 999 (8th Cir. 2004) 9

TABLE OF AUTHORITIES—Continued

	Page
QualChoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004), *cert. den.*, 73 U.S.L.W. 3556 (3/21/05)	8
Skretvedt v. E.I. Dupont De Nemours, 372 F.3d 193 (3rd Cir. 2004)	8
Smith v. City of Jackson, Mississippi, et al., 2005 U.S. LEXIS 2931, (3/30/05)	15
Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.2d. 1184 (1939)	14
Strom v. Goldman, Sachs & Co., 202 F.3d 138 (2nd Cir. 1999)	9
Varity v. Howe, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996)	13
Westaff (USA), Inc. v. Arce, 298 F.3d 1164 (9th Cir. 2002)	8
Yates v. Hendon, 541 U.S. 1, 124 S.Ct. 1330, 158 L.Ed.2d 40 (2004)	15

STATUTES

28 U.S.C §1254	2
ERISA §101, 29 U.S.C. §1021	2, 3, 4
ERISA 404(a)(1), 29 U.S.C. §1104(a)(1)	2, 4
ERISA 502(a)(3), 29 U.S.C. §1132(a)(3)	*passim*

OTHER AUTHORITIES

I Dan B. Dobbs, *Law of Remedies*, (2nd Ed. 1993)	12
III A. Scott & W. Fratcher, *The Law of Trusts*, §197 (4th ed. 1988)	11
III A. Scott & W. Fratcher, *The Law of Trusts*, §199.3 (4th ed. 1988)	11

TABLE OF AUTHORITIES—Continued

	Page
Langbein, "What ERISA Means by 'Equitable': The Supreme Court's Trail of Error in Russell, Mertens and Great-West," 103 Colum. L. Rev. 1317 (2003)	12
1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence*, (Spenser W. Symons, Ed., 5th Ed. 1941)	14
Restatement (Second) of Trusts, §197 (1959)	11
Restatement (Second) of Trusts, §201 (1959)	11
Restatement (Second) of Trusts, §205 (1959)	11

IN THE

Supreme Court of the United States

No. 04-__

SANDY CALLERY,

Petitioner,

v.

THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, J.B.'S RESTAURANTS, INC., J.B.'S FAMILY RESTAURANTS, INC., and STAR BUFFET, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The District Court's unpublished Order dismissing Star Buffet, Inc., based on the reasons set forth at the oral argument on Star Buffet, Inc.'s Motion for Judgment on the Pleadings is reproduced in the Appendix to this Petition ("App.") at 1a. The Stipulation for Dismissal with Prejudice of The United States Life Insurance Company in the City of New York and the Order Dismissing with Prejudice the Petitioner's claims against the United States Life Insurance Company in the City of New York and respondents JB's Restaurants, Inc. and JB's Family Restaurants, Inc. is

reproduced at App. 2a and 4a. The Tenth Circuit's decision affirming the Order of the District Court (reported at *Callery v. United States Life Insurance Co.*, 392 F.3d 401 (10th Cir. 2004)), is reproduced at App. 6a.

JURISDICTION

The Tenth Circuit decision affirming the District Court's dismissal of petitioner's claims was entered on December 10, 2004. Callery filed a timely Petition for Rehearing and Rehearing *En Banc* on December 24, 2004, reproduced at App. 19a. The Tenth Circuit entered its Order denying the Petition for Rehearing and Rehearing *En Banc* on January 10, 2005. The Order denying the Petition is reproduced at App. 34a. Callery invokes the jurisdiction of this Court under 28 U.S.C §1254(1)(2000).

STATUTORY PROVISIONS INVOLVED

ERISA §101, 29 U.S.C. §1021; ERISA §404(a)(1), 29 U.S.C. §1101(a)(1) and ERISA §502(a)(3), 29 U.S.C. §1132(a)(3). Relevant portions of these statutory provisions are set forth at App. 35a and 36a.

STATEMENT OF THE CASE
FACTUAL BACKGROUND

In 1994, Callery purchased life insurance coverage in the amount of $100,000 on her husband, John Callery. App. at 38a and 39a. The life insurance was offered as an employee benefit by Callery's employer and was provided through a group insurance policy issued by the United States Life Insurance Company in the City of New York ("US Life"). *Id.* The group insurance was subject to regulation under ERISA.

Callery paid premiums for John Callery's life insurance for six years. During that time, she regularly received confirmation that money was being withheld from her paycheck and that coverage was in place for John Callery. However, neither her employers nor US Life provided to Callery or her co-

employees a "summary plan description" as required under ERISA §101, 29 U.S.C. §1021, or any other document that accurately outlined the terms of the coverage and limitations of the insurance policy. App. at 39a. The failure to give notice of the policy's limitations caused significant problems for Callery. The insurance policy provided benefits for employees spouses only for so long as the employee was married to that person. However, Callery was never given information about this limitation. App. at 39a and 40a.

On August 29, 1997, Callery and John Callery divorced. Callery became a single parent with two minor children to support and coverage for John Callery's life was critical to her financial security. App. at 44a. However, because Callery had never been informed that she was not able to purchase insurance through her employer's group policy on John Callery's life after their divorce, she continued to have her employer withhold from her paychecks premiums for insurance on John Callery. It is undisputed that had Callery known of her inability to continue group life insurance coverage for John Callery through US Life following their divorce, she would have obtained insurance on John Callery's life from some other source. *Id.*

On February 28, 2000, John Callery died. Callery requested payment of the life insurance benefit from US Life and was informed, for the first time, that the terms of the policy gave her no ability to insure John Callery's life after their divorce. Shortly thereafter, US Life sent to Callery a refund of the premiums she had paid from August, 1997, the date of the divorce, through the date of John Callery's death. Callery refused to cash the check and shortly thereafter filed suit alleging two causes of action.

PROCEEDINGS BELOW

Callery filed suit against her employers from 1994 through 2000 and US Life under ERISA §502(a)(3), 29 U.S.C.

§1132(a)(3). App. at 40a. That section of ERISA provides that a civil action may be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." App. at 36a. As part of her Complaint, Callery alleged that all named defendants were fiduciaries as defined by ERISA. App. at 40a.

Callery's first cause of action was for violation of ERISA §101(a), 29 U.S.C. §1021. App. at 40a. That provision of the statute requires ERISA plan administrators to furnish plan participants with a copy of the summary plan description ("SPD"). For purposes of this case, it is undisputed that the defendants failed to satisfy the requirements of this section of the statute. Callery's second cause of action alleged that each of the defendants, as fiduciaries, violated their duties under ERISA by failing to comply with ERISA's notice requirements and the fiduciary duty requirements of ERISA §404(a)(1), 29 U.S.C. §1104(a)(1). App. at 40a and 41a.

Star Buffet, the respondent, moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the basis that the relief requested by Callery was not available under §502(a)(3). Star Buffet primarily relied on the argument that, as interpreted by *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002), §502(a)(3) does not allow for recovery of make whole relief under the facts of Callery's Complaint. The District Court granted Star Buffet's motion.

On appeal to the Tenth Circuit, the Department of Labor ("DOL") and the American Association of Retired Persons ("AARP") submitted amicus curiae briefs in support of Callery's position that monetary relief was available under §502(a)(3). App. at 45a and 67a, respectively. Callery and her *amici* distinguished the factual and legal setting of *Great-West*

by focusing on the relief that was typically available in equity in favor of beneficiaries of a trust who had suffered direct loss by a party's breach of fiduciary duty. The Tenth Circuit rejected this argument, holding that monetary relief was available regardless of whether claims under §502(a)(3) were brought by fiduciaries against plan beneficiaries as in *Great-West*, or whether a beneficiary brought suit under §502(a)(3) against breaching fiduciaries. The court concluded:

> [t]hough the issue is close, we must adhere to the Supreme Court's rather emphatic guidance and therefore conclude that in a suit by a beneficiary against a fiduciary, the beneficiary may not be awarded compensatory damages as 'appropriate equitable relief' under §502 (a)(3) of ERISA.

App. at 18a. The decision also held that the nature of the equitable relief sought by Callery did not fall within the narrow scope of relief allowed under *Great-West* and §502 (a)(3).

REASONS FOR GRANTING THE WRIT

The Circuits are scattered and in disarray over the correct interpretation of *Great-West* and the scope of available remedies under §502(a)(3). Callery's Petition for Writ of Certiorari should be granted due to this tremendous splintering among the Circuit decisions and in light of the volume of litigation concerning this issue.

In *Great-West*, this Court stated that in determining what is "appropriate equitable relief" under §502(a)(3), courts should look to "those categories of relief that were *typically* available in equity." *Great-West*, 534 U.S. at 210 (emphasis in original). In determining what categories of relief were typically available in equity, this Court counseled lower courts to rely on "standard current works" such as The Restatements of Trusts and Restitution, together with treatises from authorities such as Dobbs, Corbin and Palmer. *Great-*

West, 534 U.S. at 217. This Court determined that equitable principles did not make monetary relief available to the fiduciary in *Great-West*.

Great-West and the case it primarily relied on, *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), both dealt with claims brought under §502(a)(3) against *non*-fiduciaries. However, Callery, acting as a beneficiary under trust law principles, brought her claims against fiduciaries who breached their obligations under ERISA. Standard current works make it very clear that the scope of relief typically available in equity for claims by beneficiaries of a trust against breaching fiduciaries included monetary relief. This Court recently acknowledged that whether claims for monetary relief may be asserted against breaching fiduciaries under §502(a)(3) is an open question. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488, 2502, n.7, 159 L.Ed.2d 312 (2004).

The "DOL" has recognized for years the ability of beneficiaries to obtain monetary redress in equity for losses caused by a fiduciary's breach of duties under a trust document. It has repeatedly requested courts to allow for monetary relief in favor of ERISA beneficiaries when they have suffered monetary loss at the hands of breaching fiduciaries.

Since *Great-West* was handed down approximately thirty-nine months ago, over 310 decisions have cited to it. As noted by Justices Ginsburg and Breyer in their concurring opinion in *Davila*, additional consideration of whether §502 (a)(3) allows monetary relief is sorely needed. *Davila*, 124 S.Ct. at 2503-04. This Court should take action to clarify the relationship between "appropriate equitable relief" and losses to ERISA beneficiaries directly caused by breaches of fiduciary duty. The Petition for Writ of Certiorari should be granted.

I. CIRCUIT AND DISTRICT COURTS ARE IN NEED OF DIRECTION REGARDING WHAT IS "APPROPRIATE EQUITABLE RELIEF" UNDER ERISA §502(a)(3).

Courts since *Great-West* have struggled to carry out its directive to apply the "appropriate equitable relief" available under §502(a)(3) by evaluating "those categories of relief *typically* available in equity." *Great-West*, 534 U.S. at 310 (emphasis in original). The effort has led to a tremendous array of results that are impossible to reconcile. The Circuit decisions alone provide a mishmash of rulings regarding the scope of "appropriate equitable relief" under §502(a)(3) in light of *Great-West*.

In *Callery*, the Tenth Circuit rejected any distinction between the scope of equitable relief available to beneficiaries of a trust who have been damaged by a fiduciary's breach and the equitable relief available to a fiduciary suing a beneficiary for violation of the terms of the trust agreement. The disparity between remedies available under §502(a)(3) to fiduciaries on the one hand and beneficiaries on the other was aggravated in the Tenth Circuit by a decision issued less than three weeks after *Callery*. In *Administrative Committee of the Wal-Mart Associates Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir. 2004), the court held that a fiduciary's suit to enforce a contractually based subrogation interest was permissible under §502(a)(3).

Callery and *Willard* establish that in the Tenth Circuit, ERISA fiduciaries may bring claims for monetary relief based on the terms of the contract under §502(a)(3), while beneficiaries are completely precluded from obtaining any monetary relief whatsoever under §502(a)(3) from a fiduciary, even when the beneficiary suffers direct financial loss resulting from the fiduciary's violation of its responsibilities under ERISA. As discussed in greater detail in Section II

below, this violates core principles of trust remedy law and is far afield from the scope of relief typically available at equity.

While the Tenth Circuit is alone so far in explicitly giving fiduciaries greater rights to monetary relief under §502(a)(3) than beneficiaries, other Circuits have not settled on a uniform approach. They are figuratively, as well as literally, all over the map.

The Ninth Circuit has issued opinions to the precise opposite effect of the Tenth, allowing for recovery of monetary damages under certain circumstances by beneficiaries of an ERISA plan against breaching fiduciaries while at the same time precluding the recovery of money damages by ERISA fiduciaries against beneficiaries. *Mathews v. Chevron Corp.*, 362 F.3d 1173 (9th Cir. 2004) holds that relief typically available in equity allows an ERISA beneficiary to recover monetary relief in the form of "instatement," as differentiated from reinstatement, to an ERISA plan as an appropriate remedy for breach of fiduciary duty. The Ninth Circuit also holds that monetary recovery by fiduciaries of plan subrogation interests based on the terms of the plan documents is not allowed under *Great-West. Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002).

The Sixth Circuit has determined that monetary relief of any kind is unavailable to either ERISA beneficiaries or fiduciaries under §502(a)(3). *QualChoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004), *cert. den.*, 73 U.S.L.W. 3556 (3/21/05); *Crosby v. Bowater, Inc.*, 382 F.3d 587 (6th Cir. 2004), *cert. pet. filed* 2/8/05. The Third Circuit implies that monetary relief in the form of equitable restitution and constructive trust may be available to both ERISA fiduciaries and beneficiaries so long as the requisite facts are in place. *Skretvedt v. E.I. Dupont De Nemours*, 372 F.3d 193 (3rd Cir. 2004). The Second Circuit is to the same effect. *Gerosa v. Savasta & Co.*, 329 F.3d 317 (2nd Cir. 2003). In addition both the Second and the Seventh Circuits have pre-*Great-*

West decisions in which monetary relief for breach of fiduciary duty was allowed as "appropriate equitable relief" under §502(a)(3). *Strom v. Goldman Sachs & Co.*, 202 F.3d 138 (2nd Cir. 1999), and *Bowerman v. Wal-Mart Stores Inc.*, 226 F.3d 574 (7th Cir. 2000).

The Eighth Circuit has issued recent decisions that appear to be irreconcilable. In *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999 (8th Cir. 2004), the court allowed recovery of prejudgment interest under §502(a)(3) to an ERISA beneficiary based on equitable theories of accounting for profits and disgorgement of gains resulting from breach of fiduciary duty. However, in *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593 (8th Cir. 2005), the court cited *Callery* with approval for the idea that the restitution the Calhoons sought was merely compensatory damages that were unavailable under §502(a)(3).

Calhoon sought to distinguish *Parke* on the basis that an award of prejudgment interest "serves the purpose of preventing undue profit, not compensating the plaintiff." *Calhoon*, 2005 U.S. App. LEXIS 3920 at *7. However, this is simply the flip side of the same coin. It takes little imagination to see how the equitable remedy Callery seeks in this case serves the purpose of preventing unjust enrichment of a fiduciary who breached his duties and in so doing was able to avoid being left with the risk of loss when John Callery died, rather than serving the purpose of compensating Callery. Such sleight of hand arguments should not be allowed to conceal reality. Most, if not all, monetary awards impact all parties involved. What is compensatory to the receiving party will prevent undue profit or deter future undesirable conduct by the paying party.

In *Davila*, 124 S.Ct. at 2502, n. 7, the court specifically left open the possibility of compensation under §502(a)(3) where loss is caused by a breaching fiduciary. In a concurring opinion, Justices Ginsburg and Breyer voiced their

concern about the "regulatory vacuum" that accompanies ERISA's broad preemptive scope combined with its restricted remedial framework. *Davila*, 124 S.Ct. at 2503. These Justices stated their belief that §502(a)(3) should be read to allow remedies providing "make-whole" relief to participants and beneficiaries injured by a fiduciary's dereliction of ERISA duties. *Id*, 124 S.Ct. at 2504.

This is an appropriate case to allow consideration of that issue directly. In light of the significant legal jumble that exists in the Circuit landscape on this issue, the Court should revisit and clarify the scope of "appropriate equitable relief" under §502 (a)(3) and specifically, the relief typically available at equity when a breaching fiduciary causes loss to trust beneficiaries.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH *GREAT-WEST* AND DENIES RELIEF TYPICALLY AVAILABLE IN EQUITY.

The Tenth Circuit's decision in this case ignores the directive of *Great-West* that lower courts must evaluate what relief was "typically available in equity" in determining the scope of appropriate equitable relief under ERISA §502(a)(3). *Great-West*, 534 U.S. at 210. *Great-West* establishes the analytical process to follow in evaluating what type of relief was typically available in equity. Courts should be "consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin and the Restatements, which make the answer clear." *Great-West*, 534 U.S. at 217. The Tenth Circuit failed to evaluate the standard current works to which *Great-West* refers. Had it done so, it would be evident very quickly that the relief Callery seeks was squarely within a category of relief equity typically provided.

A number of ERISA cases from the Supreme Court state that the common law of trusts is a primary source for the development of ERISA federal common law. *Harris Trust &*

Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) ("the common law of trusts . . . offers a 'starting point for analysis [of ERISA] . . .'"); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) ("ERISA abounds with the language and terminology of trust law"); *Central States Pension Fund v. Central Transport Inc.*, 472 U.S. 559, 570, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985) (Congress did not explicitly enumerate all duties of ERISA fiduciaries but invoked the common law of trusts to define them).

The *Restatement of Trusts* makes clear that "the remedies of the beneficiary against the trustee are *exclusively equitable*." *Restatement (Second) of Trusts*, §197, p. 433 (1959) (emphasis added) (hereafter "*Restatement*"). "Trusts are, and have been since they were first enforced, within the peculiar province of courts of equity." III A. Scott & W. Fratcher, *The Law of Trusts*, §197, p. 188, (4th ed. 1988). In addition, the *Restatement* defines a breach of trust as "a violation by the trustee of any duty which as trustee he owes to the beneficiary." *Restatement*, §201, p. 442. This certainly includes a violation of ERISA's notice and fiduciary duty requirements as alleged by Callery in this case.

It is also well established under traditional equitable principles that monetary relief is allowed to an injured beneficiary against the fiduciary or trustee of a trust. *Restatement*, §205, at p. 458, cmt. *a*, states that a fiduciary is required to place the beneficiary of the trust in "the position he would have been if the trustee had not committed the breach of trust." Equitable remedies involve giving the beneficiaries of a trust the remedies necessary for protection of their interests including compelling a breaching fiduciary to provide redress " . . . either by making specific reparation or by the payment of money or otherwise." *Scott & Fratcher*, §199.3, p. 206. "Courts may . . . order money payments in the exercise of 'equity' powers" which are thereafter enforced through con-

tempt of court orders. I Dan B. Dobbs, *Law of Remedies*, §3.1, p. 278-79 (2nd Ed. 1993). The trust law framework upon which ERISA was enacted is inconsistent with the Tenth Circuit's denial of monetary relief to ERISA beneficiaries who have suffered financial loss at the hands of a breaching fiduciary. Langbein, "What ERISA Means by 'Equitable': The Supreme Court's Trail of Error in Russell, Mertens and Great-West," 103 Colum. L. Rev. 1317, 1365 (2003).

In fact, at the Tenth Circuit, Callery challenged Star Buffet to identify *any* authority for the proposition that payment of money damages from a fiduciary was not a category of relief typically available at common law equity to an aggrieved beneficiary of a trust. Star Buffet did not even attempt to take up the challenge. Despite the lack of support in any standard current works for the idea that monetary relief was *not* typically available at equity for beneficiaries when damage was caused by a breaching fiduciary of a trust, the Tenth Circuit completely forecloses that relief.

Great-West establishes that monetary relief is available for breach of a constructive trust. *Great-West*, 534 U.S. at 213-14. It is inconsistent to rule, as did the Tenth Circuit, that Congress intended to provide monetary relief under §502 (a)(3) based on a theory of constructive trust, but did not intend to provide the same relief under the same section of ERISA for violation of the requirements of an *express* trust.

Rather than look to standard current works to establish the scope of relief typically available at equity, and thus, the relief that is available under §502(a)(3), the Tenth Circuit substitutes a hard and fast rule: no monetary relief is available to ERISA beneficiaries damaged as a direct result of a fiduciary's breach of their obligations under ERISA. This "one size fits all" rule is overly simplistic and robs justice in the process. It should not be allowed to stand.

The decision also errs when it ignores *Varity v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) as a basis to provide individualized equitable relief for Callery under the circumstances of this case. In *Varity*, this Court ruled that §502(a)(3) was a remedial provision within the statute that acted as a safety net to provide appropriate equitable relief for participants and beneficiaries for injuries arising from a breach of fiduciary duty where relief was not otherwise available under ERISA. *Varity*, 516 U.S. at 512. *Varity* was decided after *Mertens* and before *Great-West*. *Great-West* specifically affirms the holding of *Varity* that §502(a)(3) is available for "individualized equitable relief for breach of fiduciary obligations." *Great-West*, 534 U.S. at 221, n.5. The court went on to state that:

> In *Varity Corp.*, however, it was undisputed that respondents were seeking *equitable* relief, and the question was whether such relief was "appropriate" in light of the apparent lack of alternative remedies.

Id (emphasis in original).

The Tenth Circuit erred by ignoring, rather than reconciling and applying, *Varity*. Its action in reading *Varity* out of the Supreme Court canon is both unwise and unnecessary. *Great-West* reconciled *Varity* by noting that the remedy sought there, reinstatement from an insolvent to a solvent employee benefit plan, was an equitable remedy. This ruling allowed for a method of directly providing monetary relief as an "appropriate equitable remedy" under the circumstances of that case.

Likewise, it is undisputed that Callery is seeking equitable relief under §502(a)(3). She has not pled otherwise. The only question is what equitable relief is appropriate, given the facts and circumstances of Callery's case.

A hallmark of equitable remedies is their sensitivity to the facts and circumstances of a particular case. Equity tailors its

remedy to be appropriate to those facts and circumstances. 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence*, §109 at 140-41 (Spenser W. Symons, Ed., 5th Ed. 1941). This Court previously highlighted the flexible, individualized and fact-sensitive nature of equitable powers: "[a]s in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 167, 59 S.Ct. 777, 83 L.2d. 1184 (1939).

The Tenth Circuit decision in this case eviscerates the meaning of "appropriate equitable relief" provided in §502 (a)(3) by robbing it of the ability to fashion a remedy that addresses the circumstances of the particular breach of fiduciary duty at issue. Equitable relief under §502(a)(3) can hardly be "appropriate" when District and Circuit Courts across the country have no ability to provide monetary relief when it is necessary to redress financial loss resulting from breaches of fiduciary duty. It stretches credulity to believe that the intent of ERISA is to allow fiduciaries under the statute to violate its protections, inflict loss on the people ERISA was enacted to protect, and walk away without accountability. Congress did not intend to put the federal judiciary in such a remedial straitjacket. Making the determination, as the Tenth Circuit did, that certain types of equitable relief are not available for Callery before the facts are available to evaluate that very question was improper. The Tenth Circuit was wrong in refusing to allow Callery to develop the necessary facts to fully determine whether, and what, equitable relief was appropriate to her.

Finally, the Tenth Circuit's failure to defer to any degree to the position taken by the DOL in this case was improper. The DOL *amicus* brief is unequivocal in stating the DOL's position that monetary damages are available to ERISA participants under §502(a)(3) when they have been damaged

by an ERISA fiduciary's breach of its fiduciary duties. This position, taken by the regulatory body that knows ERISA better than any other, should be given significant weight. *Yates v. Hendon*, 541 U.S. 1, 124 S.Ct. 1330, 1346, 158 L.Ed.2d 40 (2004) (Scalia, J., concurring, stating that considerable deference should be accorded DOL position in that ERISA case). *See*, also, *Smith v. City of Jackson, Mississippi, et al.*, 2005 U.S. LEXIS 2931, (3/30/05) (court should defer to interpretation of statute by agency with authority to implement statute in question) (Scalia, J., concurring).

Despite the status of the DOL and its experience and judgment in enforcing and interpreting ERISA, the decision pays little heed to its position. If indeed, as the decision acknowledges, "the issue is close," App. at 18a, certainly the unequivocal and long-standing DOL position on this issue should be accorded greater weight.

April 11, 2005.

Respectfully submitted,

BRIAN S. KING
Attorney at Law
336 South 300 East, Suite 200
Salt Lake City, UT 84111
(801) 532-1739

Counsel for Petitioner